

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

26131

FILE: B-208148.5

DATE: August 30, 1983

MATTER OF: Atchison Engineering Company

DIGEST:

1. Protest that contracting officer improperly ruled protester to be ineligible for award because of its alleged affiliation with debarred bidder is timely where filed within 10 days after receipt of notification of award. Even though protester knew earlier that contracting officer considered it ineligible for award, issue had been referred to Department of Labor by contracting agency. Until receipt of notice of award, contracting agency's actions could reasonably have been interpreted by protester to mean that contracting agency would consider protester eligible if contracting officer's determination of affiliation was reversed by Department of Labor.
2. Even though Department of Labor reversed contracting officer's initial determination that protester was affiliated with debarred bidder and, therefore, ineligible for award, contracting officer's initial determination was reasonable based upon evidence before contracting officer at the time initial determination was made. Contracting officer's consideration of evidence of affiliation contained in Small Business Administration's size status determination was proper.
3. Award to next low bidder, pending consideration of contracting officer's determination that low bidder was affiliated with debarred bidder by Department of Labor (DOL) and Small Business Administration (SBA), was proper. Contracting officer waited a reasonable period of time--almost 4 months after initial

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appeal was filed with SBA--before making award. Moreover, there is no requirement that award be held in abeyance pending resolution of administrative proceeding before DOL. Since DOL did not rule that low, eligible bidder was not affiliated with debarred bidder until almost 3 months after award to next low bidder, and since contracting officer's initial determination was reasonable at time it was made, award to next low bidder was valid.

Atchison Engineering Company (Atchison) protests the Air Force's rejection of its bid submitted pursuant to invitation for bids No. F05600-82-B0025, a 100-percent small business set-aside, for full food services at Lowry Air Force Base, Colorado. The protester contends that, although it was the low responsive, responsible bidder, the contracting officer improperly determined that Atchison was affiliated with a firm which was debarred by the Department of Labor for violations of the Service Contract Act, 41 U.S.C. § 351, et seq. (1976).

The protest is denied.

When bids were opened on August 19, 1982, Atchison did not appear to be in line for award since its bid was only the seventh low. However, between bid opening and September 23, all bidders below Atchison in the bidding, as well as the eighth low bidder, were eliminated from consideration for a variety of reasons. On August 25, K.P. Services Company (K.P.), the ninth low bidder, filed a small business size protest with the contracting officer alleging, among other things, that Atchison was not a small business because it was affiliated with Tamp Corporation and Garney Construction Company. The contracting officer forwarded K.P.'s size protest to the Small Business Administration (SBA) regional office. On October 12, the SBA regional office issued its determination which stated that Atchison was affiliated with Tamp Corporation and Tamp International; the SBA regional office held that, "regardless of the affiliation between the companies, Atchison Engineering Company is a small business" because the combined annual receipts for the three affiliated firms were less than the \$5.5 million small business size standard specified in the

subject procurement. On October 19, Atchison filed an appeal with the SBA Size Appeals Board in which it strenuously objected to the determination that Atchison was affiliated with Tamp Corporation and Tamp International.

In October, 1982, the tenth and twelfth lowest bidders filed protests in our Office charging that Atchison (the seventh lowest bidder) and K.P. (the ninth lowest bidder) were ineligible for award. These two protests resulted in our issuing a decision on May 23, 1983. See M&M Services, Inc.; EDP Enterprises, Inc., B-208148.3, B-208148.4, May 23, 1983, 83-1 CPD 546, for the arguments raised and our decision on the protests.

Relying on the information contained in the SBA regional office's "Size Determination Findings and Conclusions," the contracting officer concluded that, since Atchison was affiliated with Tamp Corporation and because Tamp Corporation had been listed on the debarred bidders list for violations of the Service Contract Act, Atchison was ineligible for award of this or any other Government contract. The record reflects that the Air Force referred the matter of Atchison's alleged affiliation with a debarred bidder to the Department of Labor (DOL) for its determination; however, the record does not show when this referral was made. In view of the protests filed in our Office, the Air Force held award in abeyance until February 14, 1983, at which time the contract was awarded to K.P. Notice of the award was sent to Atchison by letter dated February 16, 1983 (received by Atchison on February 22). Atchison filed its protest in our Office on March 4.

On April 26, Atchison's appeal to the SBA Size Appeals Board was decided. The SBA Size Appeals Board dismissed Atchison's appeal on the basis that Atchison had not been "adversely affected" by the earlier regional office ruling because, for size purposes, Atchison had been determined to be small and, therefore, eligible for award. On May 9, the DOL, in response to the Air Force request that it review the issue of Atchison's affiliation with Tamp Corporation, concluded that there was not sufficient evidence for it to find that Tamp Corporation had a substantial interest in

Atchison within the meaning of the debarment sanctions under the Service Contract Act.

The Air Force argues that Atchison's protest is untimely, because Atchison knew the basis for its protest several months before it filed the protest in our Office. Thus, the Air Force contends that, under section 21.2(b)(2) of our Bid Protest Procedures (4 C.F.R. part 21 (1983)), which requires that a protest be filed not later than 10 working days after the basis is known to the protester, the protest is not for consideration on its merits.

We agree with the Air Force that, several months prior to protesting, Atchison should have known that it was next in line for award and that the Air Force considered it ineligible because of its affiliation with Tamp Corporation. However, the Air Force's actions could reasonably have been interpreted by Atchison as meaning that the Air Force was willing to consider Atchison if either the SBA or the DOL ruled that Atchison was not affiliated with Tamp Corporation for purposes of debarment. The Air Force was holding award in abeyance while our Office developed the record in two earlier protests and while the SBA and the DOL were considering the affiliation issue. Furthermore, the Air Force itself had referred the matter of Atchison's alleged affiliation to the DOL. It was not until Atchison actually was notified by the Air Force that award had been made to K.P. that Atchison knew it was no longer in contention for the award. Moreover, it was not until the DOL ruled that Atchison was not affiliated with Tamp Corporation for debarment purposes that Atchison could argue that the contracting officer's determination of affiliation based on SBA's findings and award to K.P. were erroneous. Atchison filed its protest within 10 days after it received the notice of award to K.P. and prior to the DOL decision that it was not affiliated with a debarred bidder. In these circumstances, we find that the protest was timely filed under section 21.2(b)(2) of our Bid Protest Procedures.

Our Office will not consider the question of whether Atchison is affiliated with a debarred firm, because under

the Service Contract Act, such determinations are to be made by the Federal contracting agency and the Secretary of Labor. R & D Maintenance Services, Inc., B-209253, December 20, 1982, 82-2 CPD 553; Enviro-Development Company, B-195215, July 12, 1979, 79-2 CPD 30. Even though enforcement under the act is entrusted to the Federal agency head and the DOL, we will review this matter in a limited manner. Our review will be restricted to an examination of whether the contracting officer's determination that Atchison was ineligible was reasonable, whether the award was properly made to K.P. in the circumstances presented, and whether any corrective action is mandated by the DOL's postaward finding that there is insufficient evidence to consider Atchison affiliated with Tamp Corporation for debarment purposes.

We cannot conclude that the contracting officer acted improperly. We must view the reasonableness of the contracting officer's determination in light of the evidence which was known to the contracting officer at the time the contracting officer determined that Atchison was affiliated with a debarred firm. A&C Building and Industrial Maintenance Corporation--Reconsideration, B-196829.2, September 18, 1980, 80-2 CPD 202; see also Mark A. Carroll & Son, Inc.--Reconsideration, 60 Comp. Gen. 609 (1981), 81-2 CPD 65. At the time the contracting officer decided that Atchison was not eligible for award, the only evidence before the contracting officer was the SBA regional office's "Size Determination Findings and Conclusions" which was issued in response to the size protest filed by K.P. The SBA regional office made its determination that Atchison was an eligible small business bidder in spite of its affiliation with Tamp Corporation pursuant to the Small Business Act (15 U.S.C. § 637(b)(6) (1976)) and implementing regulations. See 13 C.F.R. part 121 (1983).

Atchison argues that the SBA is not authorized to make findings of affiliations for debarment purposes. In a report to our Office on the present protest, the SBA stated that "concerns may be affiliated for the purpose of a Part 121 size determination, yet not be affiliated for some different contract eligibility purpose, for example, contractor debarment." Even though the SBA regional office ruling was

favorable to Atchison with regard to Atchison's size, the SBA regional office's findings contained considerable evidence that Atchison was affiliated with Tamp Corporation--a firm which had been debarred for Service Contract Act violations. While the SBA was only authorized to make a size determination, a proper part of making such a determination consists of examining a firm's affiliations with other firms. See 13 C.F.R. § 121.3-4 (1983). Thus, we find nothing improper in the SBA regional office including evidence of Atchison's affiliation with Tamp Corporation in its findings in support of the size status determination.

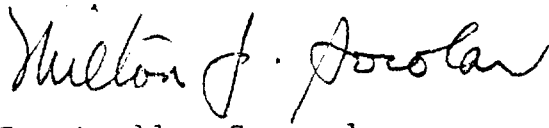
Under the Service Contract Act, the contracting officer had a duty to enforce the debarment provisions of the act by ensuring that the contract not be awarded to any debarred firm or to any firm in which a debarred firm had a substantial interest. 41 U.S.C. § 352(b) and § 354 (1976); Defense Acquisition Regulation § 1-604.2(b) (Defense Acquisition Circular (DAC) No. 76-27, May 15, 1981) and § 2-404.2(f) (DAC No. 76-17, September 1, 1978); see also KLS Enterprises, Inc., B-194511.2, October 16, 1979, 79-2 CPD 257. In our opinion, the contracting officer properly examined the evidence presented in the SBA regional office's size status findings, as well as the allegations and supporting evidence supplied by K.P. in its size protest letter. This included evidence that Atchison employed as its president a person who was employed by Tamp Corporation until some time after bid opening, evidence that Tamp Corporation and Atchison shared a common postage meter stamp, and evidence that after its debarment Tamp proposed to the Government that several of its contracts be novated and that Atchison be recognized as its successor. In these circumstances, we conclude that the contracting officer properly considered the SBA's findings and that there was a reasonable basis for the contracting officer's determination that Atchison was affiliated with a debarred bidder at the time that determination was made. Furthermore, even though the DOL ultimately ruled that there was insufficient evidence to find that Atchison was affiliated with Tamp Corporation, we note that the DOL stated that "certain events strongly suggest a connection between Atchison and Tamp." In particular, the DOL points out that Atchison was incorporated after initiation of debarment proceedings against Tamp Corporation and that Tamp Corporation agreed to guarantee certain loans for Atchison.

Concerning whether the contracting officer properly awarded the contract to K.P. before the SBA and the DOL had issued their rulings on the matter of Atchison's alleged affiliation with a debarred bidder, we conclude that the contracting officer acted properly. Atchison's appeal to the SBA was filed by letter dated October 19, 1982, and there is nothing in the record to show when the Air Force referred the matter to the DOL. Thus, the Air Force waited until February 14, 1983, or almost 4 months after the appeal to SBA was made, before making the award. In our opinion, the contracting officer waited a reasonable period of time for a response from SBA before making the award. Furthermore, we know of no legal requirement that an award be held in abeyance pending resolution of a DOL review of an affiliation matter. See Midwest Service and Supply Co. and Midwest Engine Incorporated, B-191554, July 13, 1978, 78-2 CPD 34; see also F&H Manufacturing Corp., B-206320, April 27, 1982, 82-1 CPD 392. Finally, the contracting officer and Air Force Headquarters made a determination that award before resolution of the two earlier protests by our Office was in the Government's best interest to "prevent an adverse impact on essential mission performance" as authorized under Defense Acquisition Regulation § 2-407.8(b)(3) (1976 ed.).

In view of the DOL's postaward reversal of the contracting officer's determination that Atchison was affiliated with a debarred bidder, we must decide whether termination of K.P.'s contract is necessary. We conclude that such action is not necessary. The DOL did not issue its ruling until almost 3 months after award. Since we have already held that the contracting officer was empowered to decide on affiliation matters under the Service Contract Act, that the contracting officer's determination was reasonable based upon the evidence before him, and that the award was properly made before the DOL issued its decision, we find that the award to K.P. was valid and should be allowed to stand. See, for example, Mark A. Carroll & Son, Inc.--Reconsideration, *supra*, wherein we held that a low bidder which had been held to be ineligible for award of a procurement contract on the basis that it had defaulted on the original contract was not entitled to award even though the board of contract appeals ruled after award to the

second low bidder that the original default termination was erroneous. Accordingly, we find that the DOL's ruling that Atchison is eligible for Government contracts has prospective effect only.

The protest is denied.

for 
Comptroller General
of the United States